No. 76-1481

In the Supreme Court of the United States

OCTOBER TERM, 1977

DIGNA BALLENILLA-GONZALEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 546 F. 2d 515.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1976. A petition for rehearing with a suggestion for rehearing *en banc* was denied on January 27, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on April 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner may challenge her deportation order on grounds which she did not raise before the court of appeals.

2. Whether provisions of the Immigration and Nationality Act that an alien in a deportation proceeding may be represented by counsel of her choosing but not at the expense of the government has been superseded by, or conflicts with, the Legal Services Corporation Act of 1974.

3. Whether the deportation of petitioner would cause the "*de facto* deportation" of her citizen child, in violation of the child's rights under the citizenship clause of the Fourteenth Amendment.

STATUTES INVOLVED

8 U.S.C. 1252(b)(2) provides:

> the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

8 U.S.C. 1362 provides:

> In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

STATEMENT

Petitioner is a native and citizen of the Dominican Republic. She last entered the United States at Puerto Rico on January 8, 1974, on a nonimmigrant student visa which entitled her to remain in this country until May 30, 1974. Upon the expiration of her student visa, petitioner, then five months pregnant and without the permission of the Immigration and Naturalization Service ("Service") to

remain in this country, traveled to Waterbury, Connecticut, to visit relatives (Pet. App. 2a).

Petitioner gave birth to a son in Waterbury on September 15, 1974. Informed that she could not receive public assistance from the Waterbury welfare office until she resolved her immigration status, petitioner went to the Hartford office of the Service to apply for permanent resident status in October, 1974 (*ibid.*). The Service commenced deportation proceedings against petitioner after learning that her visa had expired and that she had not applied for or been granted an extension to remain in this country.

At petitioner's deportation proceedings, the immigration judge informed petitioner that she had a right to be represented by counsel, but not at the government's expense. Petitioner waived counsel and the immigration judge found her to be deportable (Pet. App. 3a-5a). Petitioner informed the judge that she did not have the funds to leave the country voluntarily, and he therefore entered a deportation order against her and informed her that she might wish to see the Legal Aid Society about an appeal (Pet. App. 5a).

Petitioner obtained representation from the Legal Aid Society and appealed the deportation order to the Board of Immigration Appeals, contending alternatively that she was not deportable, due to the presence of mitigating circumstances and the lack of due process at the hearing, and that in any event, she should have been granted the privilege of voluntary departure. The Board on December 4, 1975, found petitioner deportable but authorized her to depart voluntarily before January 3, 1976. The Board entered an alternative order of enforced departure to take effect if she did not leave by that date (Pet. App. 6a-8a).

Petitioner did not depart voluntarily and on May 18, 1976, she was ordered to report for deportation. The next day petitioner filed a petition for review of the Board's decision with the court of appeals. Among other issues, petitioner alleged that she did not waive the privilege to obtain counsel granted by the Immigration Act, and that the Immigration Act's failure to provide counsel for indigent aliens denied her due process and equal protection (Pet. App. 8a-16a).[1] The court of appeals affirmed the deportation order (Pet. App. A), holding that petitioner had waived her right to counsel and that she was not prejudiced by the lack of counsel, because even when later represented by counsel she had alleged no facts which would rebut the immigration judge's finding that she was deportable.

ARGUMENT

1. Petitioner raises two issues, neither of which was briefed or argued in the court of appeals or addressed by that court in its opinion. "Only in exceptional circumstances will this Court review a question not raised in the court below." *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16. See also *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, slip op. 5 n. 7; *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n. 2. There are no exceptional circumstances here.

In the court of appeals petitioner made three points with respect to the right to counsel issue, but none of her arguments asserted an alleged conflict between the

[1]The other issues raised involved the fairness of the hearing, the sufficiency of the evidence supporting the immigration judge's finding of deportability and petitioner's right to voluntary departure.

Immigration Act and the Legal Services Corporation Act.[2] Likewise, she did not argue in the court of appeals that her own deportation would cause an allegedly illegal "*de facto* deportation" of her citizen child. Since petitioner has been represented by counsel at all stages since her deportation hearing, this Court should not consider petitioner's new claims.

2. In any event, petitioner's claims are without merit. Petitioner contends (Pet. 5-10) that the Immigration and Nationality Act (66 Stat. 204, as amended, 8 U.S.C. 1251 *et seq.*), specifically 8 U.S.C. 1252(b)(2) and 1362, which sections provide that an alien has the privilege of representation by an attorney at a deportation hearing, but not at the government's expense, has been superseded by the Legal Services Corporation Act of 1974, 88 Stat. 381, 42 U.S.C. (Supp. V) 2996e(a)(1)(A), which "provide[s] financial assistance to qualified programs furnishing legal assistance to eligible clients." Even assuming that petitioner could have availed herself of legal assistance under the Legal Services Corporation Act at the hearing (as she did on appeal), however, there is nothing in the Legal Services Corporation Act which requires that counsel be appointed at deportation

[2]The three-pronged attack included due process and equal protection claims and a denial that she had waived her right to counsel as provided in the Immigration Act. The Assistant United States Attorney who argued the appeal below advises that at oral argument petitioner's counsel did not address the constitutional claims and rested on the waiver argument. He further advises that, at the conclusion of oral argument, one of the attorneys on petitioner's brief (but not the arguing attorney) attempted to address the court and mentioned for the first time the Legal Services Corporation Act of 1974, but that the court refused to entertain the argument.

hearings and thus there is no inconsistency with the Immigration and Nationality Act.[3]

Beyond this, however, petitioner explicitly waived any right to counsel after having been informed three times that the purpose of the hearing was to determine if she was to be deported (Pet. App. 3a n. 2). Finally, as the court of appeals noted, petitioner was not prejudiced by her lack of counsel since she has never, even through counsel, contested her deportability[4] (Pet. App. 12a):

> It is significant that her Legal Aid Counsel, after reviewing the case, apparently concluded that no relevant new information could be adduced that might establish a right to remain in the United States. Being unable to show any prejudice by reason of her lack of counsel at the hearing, he accordingly did not move to reopen the hearing but chose instead to appeal to the Board, seeking relief based on mitigating circumstances and alleged denial of due process at the deportation hearing. For this reason we need not reach the constitutional and statutory questions petitioner attempts to raise.

3. Petitioner also asserts that her deportation would cause the "*de facto* deportation" of her child (who,

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[3]Since deportation proceedings are civil rather than criminal "[i]t is clear that any right an alien may have in this regard is grounded in the fifth amendment guarantee of due process rather than the sixth amendment right to counsel. * * * Therefore, we analyze the proceedings in terms of their fundamental fairness on a case-by-case basis." *Barthold* v. *Immigration and Naturalization Service*, 517 F. 2d 689, 690-691 (C.A. 5) (citations omitted).

[4]Contrary to petitioner's argument (Pet. 9-10), *Barthold* v. *Immigration and Naturalization Service*, *supra*, did not hold that an alien must be informed of the availability of free legal counsel before he can be held to have validly proceeded without such counsel.

by reason of his birth, is a United States citizen), in violation of the child's rights under the citizenship clause of the Fourteenth Amendment. But petitioner's child is not being deported, in fact or in law. As a citizen, he may stay in this country if petitioner wishes to leave him in the care of relatives; should petitioner take him with her, he may return at any time. Although he may depart, he is not being deported. See, *e.g.*, *Perdido* v. *Immigration and Naturalization Service*, 420 F. 2d 1179 (C.A. 5); cf. *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72.[5] Petitioner's argument would preclude deportation of any alien who gave birth to a child while illegally in this country. Congress has established no such defense to deportation nor can the citizenship clause of the Fourteenth Amendment be read to provide such a defense.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1977.

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[5]*Acosta* v. *Gaffney*, 413 F. Supp. 827 (D. N.J.), which held that deportation of an alien parent is *de facto* deportation of a citizen child, and upon which petitioner relies, has been reversed by the United States Court of Appeals for the Third Circuit. *Acosta* v. *Gaffney*, No. 76-2094 (decided July 6, 1977).

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